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SUPREME COURT, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

**No. 71-575**

GOMEZ,

*Appellant,*

—v.—

PEREZ,

*Appellee.*

## MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

**No. 71-575**

GOMEZ,

*Appellant,*

—v.—

PEREZ,

*Appellee.*

## IOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of this Court, the nerican Civil Liberties Union respectfully moves for ve to file a brief *amicus curiae* in the above-entitled case. e attorney for appellant has consented to the filing of e attached brief. The attorney for respondent refused nsent.

The American Civil Liberties Union has a long-standing stitutional interest in protecting the constitutional rights children, legitimate and illegitimate. Attorneys of the nerican Civil Liberties Union appeared before this Court recent years to argue *In Re Gault,* 387 U.S. 1 (1967) d *Levy* v. *Louisiana,* 391 U.S. 68 (1968). The former cision held that children involved in juvenile proceed-gs were entitled to a wide range of constitutional pro-

tections in such proceedings. The latter decision held that illegitimate children were entitled as a constitutional matter to pursue an action for money damages incurred by the wrongful death of their natural mother. The Union also filed *amicus curiae* briefs in *Labine* v. *Vincent*, 401 U.S. 532 (1971), and in *Weber* v. *Aetna Casualty and Surety Comp.*, 92 S. Ct. 1400 (1972).

The case at bar draws into question the right of illegitimate children to receive financial support from their natural father. The question is a complex one which involves construction of the equal protection clause of the Fourteenth Amendment. We believe that our brief will be of substantial assistance to the Court.

Respectfully submitted,

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*Attorneys for Movant*

In the

# Supreme Court of the United States

October Term, 1972

**No. 71-575**

Gomez,

*Appellant,*

—v.—

Perez,

*Appellee.*

## BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

### Interest of Amicus

The interest of amicus is set out in the Motion for Leave to File, *supra*.

### Statement of the Case

Appellant sued, in behalf of her illegitimate child, for a declaration that appellee was the father of such child and that he be required to provide financial support to him. The trial court entered a judgment declaring appellee to be the father of the child, but decreeing that there is no civil liability on the part of a father to support his illegitimate children. The Court of Civil Appeals of Texas affirmed, 466 S.W.2d 41 (1971), on the grounds that neither Texas common nor statutory law provides a right of action by which an illegitimate child can recover support payments from his father. This Court noted probable jurisdiction to decide the constitutional question involved.

## The Question Presented

Whether Texas law denying to illegitimate children a right to paternal support while granting such right to legitimate children violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

## ARGUMENT

### I.

**The Texas law denying the right of paternal support to illegitimate children while granting it to legitimate children violates the Equal Protection Clause of the Fourteenth Amendment, as applied by the Court in *Levy* v. *Louisiana* and *Weber* v. *Aetna Casualty & Surety Co.***

The Court once again is asked to apply the Equal Protection Clause of the Fourteenth Amendment to state discrimination against children who have the misfortune to be born out of wedlock. In its most recent decision in this area, the Court struck down a Louisiana statute which relegated illegitimate children to an inferior status, as opposed to legitimate children, with regard to workmen's compensation benefits. *Weber* v. *Aetna Casualty & Surety Co.*, 92 S. Ct. 1400 (1972). The Court thereby re-affirmed its earlier ruling in *Levy* v. *Louisiana*, 391 U.S. 68 (1968). The *Weber* Court summarized its holding as follows:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate

child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility of wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." 92 S. Ct. at 1406-1407.

This analysis applies equally to the instant case. Here, too, a class of children is singled out and penalized solely because of the status of their birth, over which they have no control. Here, too, there is no legitimate state interest, "compelling or otherwise," to justify such unequal treatment. The guarantees of the Equal Protection Clause require that this Court strike down the arbitrary and capricious state discrimination by which illegitimate children are denied the same rights as legitimate children to paternal support.

**A. *The bearing of applicable equal protection standards upon a state classification based upon legitimacy of birth.***

As this Court recognized in both the *Levy* and *Weber* decisions, at least two tests have been applied to determine the validity of state statutes under the Equal Protection Clause. At a minimum, any state classification must bear a reasonable relationship to a legitimate state purpose.

> [T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U.S. 150, 155 (1896).[1]

In *Levy* and *Weber* the Court found that prohibiting recovery by illegitimates in those cases in no way furthered the state goals of compensating children who had lost a parent through the wrongful action of another or in the course of such parent's employment. Moreover, the recognized state interest in protecting the family unit was not furthered by the discriminations against the unfortunate children in those cases. As the *Weber* opinion stated:

> We do not question the importance of that interest; what we do question is how the challenged statute will promote it . . . Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation. *Weber* v. *Aetna Casualty and Surety Co.,* 92 S. Ct. at 1405.

See also, *Glona* v. *American Guarantee and Liability Insurance Co.,* 391 U.S. 73, 75 (1968) (companion case to *Levy,* striking down a state law which denied wrongful death benefits to a mother for the death of her illegitimate child). As will be shown below, the discrimination in the instant case no more furthers a legitimate state interest than did the state action in *Levy, Glona,* and *Weber.*

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[1] See also *Morey* v. *Doud,* 354 U.S. 457 (1957); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

The second test for determining questions arising under the Equal Protection Clause analyzes the nature of the characteristics or traits used to determine the classification and also the scope of individual conduct regulated or proscribed by the statute. If upon such examination it is found either that the classification is based upon an "inherently suspect" characteristic, or that the regulation infringes upon "sensitive and fundamental personal rights," the presumption of constitutionality normally accorded state enactments is reversed. See McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection,* 61 Mich. L. Rev. 645, 666, 667 (1963). The statute will stand only if there "clearly appears . . . some overriding statutory purpose . . ." *McLaughlin* v. *Florida,* 379 U.S. 184, 192 (1964), or it is *necessary* "to promote a *compelling* governmental interest." *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969).[2] The state must demonstrate that there are no reasonable alternative means of accomplishing the stated purpose without discriminating, *Carrington* v. *Rash,* 380 U.S. 89 (1965), and that the classification is neither impermissibly overbroad or underinclusive. *Kramer* v. *Union Free School Dist.,* 395 U.S. 621 (1969).

As the Court in *Weber* recognized, whatever test is ultimately applied under the Equal Protection Clause,

> [t]he essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? 92 S. Ct. at 1405.

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[2] See also *Oyama* v. *California,* 332 U.S. 633, 640 (1948); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966).

If the personal rights endangered are fundamental and substantial, or if the basis for the classification is itself invidious, then a compelling state interest is required to override them and sustain the classification. If the personal rights involved are not so basic, then the state interest required to override them need not be so significant. A legitimate interest reasonably related to the classification is sufficient to sustain it. It may well be, however, that in some instances no sharp line can be drawn in applying the two standards; rather, there may be continua of suspectness and fundamentality, and there certainly may be a continuum of asserted state interests. See, *Comment—The Evolution of Equal Protection: Education, Municipal Services, and Wealth,* 7 Harv. Civ. Rts.—Civ. Lib. L. Rev., 103, 107 (1972).

The next section of this brief demonstrates that the classification here, as in *Levy* and *Weber,* seriously infringes the fundamental rights of illegitimate children and that classification according to legitimacy of birth is inherently invidious. Section C will show that, as in those cases, no legitimate state interest is served by the classification at issue, and that it therefore violates the Equal Protection Clause by whatever test is applied.

**B. *A classification based upon legitimacy of birth is invidious and requires strict scrutiny under the Equal Protection Clause.***

The *Levy* and *Weber* Courts strongly suggested that the strict "compelling state interest" test was applicable to state discriminations against illegitimates.[3] To the extent

[3] In *Levy,* the Court stated: " . . . we have been extremely sensitive when it comes to basic civil rights . . . The rights asserted here in-

that the Court's decisions rested on this analysis, they were on solid ground. For classifications most often are suspect when they rest upon a status over which an individual has no control, such as race, *Brown* v. *Board of Education, supra;* ancestry or nationality, *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943), or alienage, *Graham* v. *Richardson,* 403 U.S. 365 (1971). It is obvious that a child can no more control his legitimacy than he can control his race or ancestry. The illegitimate child is as entitled as the black child or the Japanese-American child to treatment as an individual rather than as a member of a minority group to which he belongs by the fact of birth. The state should be required to meet the same standard to justify discriminatory treatment of illegitimates as it must concerning racial, national or ethnic minorities. See Gray and Rudovsky, *The Court Acknowledges the Illegitimate: Levy* v. *Louisiana and Glona* v. *American Guarantee & Liability Co.,* 118 U. Pa. L. Rev. 1, 5-7 (1969).

A related ingredient of "suspect" classifications is the *unjustified* stigma of inferiority which usually attaches to them, a stigma which cannot help but destroy the "dignity of the individual." *Korematsu* v. *United States,* 323 U.S. 214, 236 (1944) (Justice Murphy dissenting). *See* Black, *The Lawfulness of the Segregation Decisions,* 69 Yale L.J. 421, 424 (1960); *Developments in the Law—Equal Protections,* 82 Harv. L. Rev. 1065, 1127 (1969). In *Brown* v. *Board of Education,* the Court specifically referred to the

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volve the intimate familial relationship between a child and his own mother." 391 U.S. at 71.

In *Weber,* the Court concluded its opinion by referring to the state classification there as imposing discriminations "relating to status of birth," 92 S. Ct. at 1407—the classic definition of a suspect classification. See also *Graham* v. *Richardson,* 403 U.S. 365 (1971).

adverse affect of a stigma of racial inferiority upon the potential for educational achievement of black school children:

> To separate [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . 347 U.S. at 494.

Similarly, in striking down a state anti-miscegenation statute in *Loving* v. *Virginia,* 388 U.S. 1 (1967), the Court held that the interests relied upon by the state to justify the classification were in themselves indicia of black inferiority:

> [T]he state court concluded that the State's legitimate purposes were to "preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," *obviously an endorsement of the doctrine of White Supremacy. Id.,* at 7 (emphasis added).[4]

Of course, mere suspicion that stigma attaches whenever classification is made with respect to some minority group will not always invoke strict scrutiny under the Equal Protection Clause. As one recent comment has noted:

> . . . the latter position is not so extreme as to be untenable if only because the potential for abuse with

[4] See also *McLaughlin* v. *Florida, supra* at 193; *Strauder* v. *West Virginia,* 100 U.S. 303, 306-308 (1880).

respect to certain minorities is a very real one. However, if one could also provide some indicia that the potential for abuse had in reality been realized, application of the strict standard of review would be justified. *Comment—The Evolution of Equal Protection: Education, Municipal Services, and Wealth,* 7 Harv. Civ. Rts.—Civ. Lib. L. Rev. *supra* at 137-138.

There is little doubt, however, that the potential for abuse has been more than realized in the case of illegitimate children. This Court has noted "the social opprobrium suffered by these hapless children." *Weber* v. *Aetna Casualty & Surety Co.*, 92 S. Ct. at 1407. The effect of the stigma of illegitimacy in our society has elsewhere been described as a "psychic catastrophe." [5] Indeed, the psychological effect of the stigma of bastardy upon its victim [6] is

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[5] "In the case of illegitimate birth the child's reactions to life are bound to be completely abnormal . . . To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." Fodor, *Emotional Trauma Resulting From Illegitimate Birth,* 54 Archives of Neurology and Psychiatry 381 (1945).

[6] In Jenkins, *An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children,* 64 Am. J. Sociology 169 (1958), the author investigated whether there were significant differences in the "adjustment" of legitimate and illegitimate Negro school children. All children in the (unfortunately rather small) sample were recipients of Aid to Dependent Children's funds and otherwise lived in comparable economic and social circumstances. "Adjustment" was considered to be reflected in I.Q., age-grade placement, school absences, academic grades, teacher's rating, and personal and social adjustment as measured by the California test of personality. Jenkins reported that:

> Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences . . . .
>
> The second discernible pattern was that the older group of illegitimate children consistently made a poorer showing than

comparable to the damaging psychological effects upon the victims of racial discrimination.

Thus, all the ingredients requiring strict scrutiny under the Equal Protection Clause are present where state laws classify on the basis illegitimacy. In addition, the Court has recently noted the constitutional priority of the right of a father to a full and legal relationship with his child, even when that child is illegitimate. In striking down under the Fourteenth Amendment an Illinois statutory scheme whereby an unwed father was deprived of custody of his illegitimate children without a hearing and without being given priority in subsequent adoption proceedings, the Court stated:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. . . .
>
> . . . Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. *Stanley* v. *Illinois,* 92 S. Ct. 1208, 1212-1213 (1972).[7]

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the younger group, in comparison with the legitimate children. A possible explanation for this is that, as these children grow older and are able to internalize fully the concept of illegitimacy and as they become increasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory. *Id.* at 173.

[7] See also *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942).

The right of an illegitimate child to a legal relationship with his or her father equal to that afforded to a legitimate child must be of the same constitutional dimension as the right of a father to such a relationship with his child.

At stake in this case is the fundamental right of all children to grow up free from disabilities imposed by the state based solely on the circumstances of their birth; the right to an equal opportunity for individual development and fulfillment free from legal sanctions that create or support economic and psychological inferiority.

C. ***No legitimate state interest, compelling or otherwise, justifies the classification by which illegitimate children are denied the right to paternal support granted to legitimate children.***

This Court has explained that "[i]n determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Kramer* v. *Union Free School District, supra,* 395 U.S. at 626.

The opinion of the Court of Civil Appeals of Texas below dealt with the constitutional considerations involved in this case by ignoring them completely. It is not surprising, therefore, that no attempt was made to identify and analyze the state interests that might arguably be served by the state classification at issue. A thorough discussion of the issues is contained in the dissenting opinion of Justice Cadena, who found that the asserted state interests were either not applicable or were not furthered by the classification in a significant or permissible way.

The state interest most commonly asserted in defense of state discriminations against illegitimates is that such classifications encourage marriage by deterring extramarital sexual relations.[8] This contention was raised and rejected by the Court in the *Levy*, *Glona*, and *Weber* cases.[9] The Court found it "farfetched" to believe that persons will shun illicit relations because of the possible long-term disabilities that might be placed upon the offspring that could result from such relations.[10]

There is even less reason in the present context to suppose that removing the obligation of support from the

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[8] It might be questioned whether the state any longer has a legitimate interest in regulating the consensual sexual activity of individuals in the light of modern notions of the right to privacy and association. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

[9] The affirmance of the Louisiana inheritance statute in *Labine* v. *Vincent*, 401 U.S. 532 (1971), did not rest on any asserted state interest in regulating morals or marriage. Rather, as the *Weber* Court noted, "[t]hat decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders." 92 S. Ct. at 1404. The Court noted that it had "long afforded broad scope to state discretion in this area," *Mager* v. *Grimar*, 8 How. 490, 493 (1850); *Lyeth* v. *Hoey*, 305 U.S. 188, 193 (1938), because of "the *substantial* state interest in providing for 'the stability of . . . land titles and the prompt and definitive determination of the valid ownership of property left by decedents,' . . . " 92 S. Ct. at 1404 (emphasis added, citation omitted). As in *Weber*, the compelling state interest that existed in *Labine* is absent in the instant case.

[10] The Court's insight is shared by laymen. In a scientific survey of 2031 families in Illinois, "carefully selected to represent the whole population of Illinois," only twenty percent of those polled agreed with the following statement: "The discrimination imposed by our law on the illegitimate child is an effective way to discourage sexual intercourse between unmarried persons." Eighty percent either disagreed or had no opinion. Krause, *Illegitimacy: Law and Social Policy*, 161-162, 171 (1971).

father of an illegitimate child would discourage sexual promiscuity. Indeed, as the dissent below suggested, the effect, if any, would be the opposite. A man might feel freer to engage in extra-marital sexual activities when he is secure in the knowledge that he cannot be held financially responsible for any children that might result from such unions.[11]

The state might also assert an interest in preventing the disruption of the legal family unit. By assuring that a married man is not obligated to support his illegitimate children, so the argument runs, the state guarantees that his legitimate children may fully draw upon his resources.

The circularity of this argument is apparent. The very question at issue is whether the state may discriminate between legitimate and illegitimate children in creating paternal support obligations. While the interest of the state in providing for the security of the family unit is unquestioned, it may do so only in ways that do not invidiously discriminate in violation of the Fourteenth Amendment. Mere repetition of the fact that illegitimate children are not a recognized part of the legal family and are not now entitled to paternal support is not sufficient to justify the state provision to that effect.

Moreover, the flagrant overbreadth and underinclusiveness of the illegitimacy classifications in the Texas child support scheme exposes the emptiness of the claim that the

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[11] In the same University of Illinois survey, seventy-five percent of those polled *agreed* with the following statement: "Making fathers financially responsible for their illegitimate children would seem to be a more effective way to discourage promiscuous sexual intercourse than imposing no obligation or a limited support obligation on fathers of illegitimate children." Krause, *supra* note 10 at 171.

discrimination involved here is meant to preserve the fin
cial integrity of the legal family unit.[12] The classification
overbroad in that *unmarried* men who have no family
protect are as free from a support obligation to their il
gitimate children as are married men who are fathers
legitimate children. If the purpose of the discriminato
classification is to insure the financial viability of the le
family unit, only men who are fathers of legitimate ch
dren should be freed from a support obligation towa
their illegitimate children. The alleged state interest
not served by removing this burden from unmarried m
The discriminatory classification is overbroad in a seco
way in that under Texas law a man is not required to su
port his illegitimate children even if he has the financ
means to do so without stinting his legitimate family.

The classification is also underinclusive. Married *wom*
in Texas are under an obligation to provide for the su
port of all their children, legitimate or illegitimate.
fathers are freed from an obligation to support their il
gitimate children on the rationale that they are thereby al
to support their legitimate children more fully, the sa

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[12] While the Equal Protection Clause does not require that
asserted state goal be achieved by lines drawn "with mathemati
nicety," the Court has not hesitated to examine whether and
what degree the classes actually created do in fact achieve
asserted purpose. As the Chief Justice recently explained in *Re*
v. *Reed*, 404 U.S. 71, 75, 76 (1971), "The Equal Protection Cla
. . . den[ies] to States the power to legislate that different tre
ment be accorded to persons . . . on the basis of criteria wholly un
lated to the objective of that statute. A classificiation . . . 'must r
upon some ground of difference having a fair and substantial re
tion to the object of the legislation, so that all *persons simila*
*circumstanced shall be treated alike.*' *Royster Guano Co.* v. *V*
*ginia*, 253 U.S. 412, 415 (1920)." (Emphasis added.) Classificati
that are over or underinclusive obviously do not treat persons si
ilarly situated alike.

rationale should apply to mothers. A mother's support of an illegitimate child interferes with her ability to support her legitimate children as much as a father's.[13]

The over and underinclusive nature of the classification underscores the fact that it is not related to any state interest in the financial integrity of the family. Rather, it simply and unjustifiably imposes a penalty upon the helpless children involved, furthering the already substantial stigma of illegitimacy which they bear.

The Ohio Supreme Court in *Baston* v. *Sears, supra,* note 9, upheld a discriminatory classification similar to that involved here on the theory that a married father voluntarily assumes the obligation to support the children of his marriage as an incident of the nuptial contract. The Court justified the discrimination against illegitimate children by an alleged state interest in preserving the right of a father to choose whether or not to support his children by marrying their mother. 239 N.E.2d at 63-64.

This contention is also unpersuasive, as the dissent in this case below shows:

> The fictitious nature of the consensual nature of the father's support obligation is apparent. The obliga-

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[13] Texas might seek to defend the distinction between maternal and paternal support obligations by arguing that *Levy* dealt exclusively with the mother-child relationship and therefore requires the mother, but not the father, to equally support legitimate and illegitimate children. Cf., *Baston* v. *Sears,* 239 N.E.2d 62 (Ohio 1968). The *Weber* Court disposed of any such distinction when it held that illegitimate children may recover workmen's compensation for the death or injury of their *father.*

Such a classification based on sex is also an invidious discrimination unrelated to any reasonable state interest, and therefore independently violates the Equal Protection Clause. Cf. *Reed* v. *Reed,* 404 U.S. 71 (1971).

> tion to support legitimate children would exist eve
> if the man . . . expressly stated, with the full acqui
> escence of the bride, that he did not assume suc
> obligation. If such a repudiation is ineffective, the
> consent is irrelevant. . . . The obligation is impose
> by law, irrespective of consent. 466 S.W.2d at 46.

As in Ohio, the obligation of a Texas father to suppor his children when he marries their mother is imposed b law, and the absence of an obligation of a father to sup port his illegitimate children is sanctioned by law. A we have shown, there is no compelling or even cognizabl state interest to justify this discrimination.

## CONCLUSION

**For the reasons stated, the judgment of the Court o Civil Appeals of Texas should be reversed.**

Respectfully submitted,

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August 1972